CORRECTED COPY

NO. 96-1291

In the Supreme Court of the United States

OCTOBER TERM, 1996

DOLORES M. OUBRE,
Petitioner

versus

ENTERGY OPERATIONS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Barbara G. Haynie
DONELON, HAYNIE & DONELON
Suite 1010
3445 N. Causeway Boulevard
Metairie, Louisiana 70002
Telephone: (504) 838-0077

W. Richard House, Jr.
John S. Lawrence, Jr.
HOUSE, KINGSMILL, RIESS &
SEABOLT, L.L.C.
Suite 3300
201 St. Charles Avenue
New Orleans, Louisiana 70170
Telephone: (504) 581-3300

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

59 pp

QUESTION PRESENTED

1. Whether petitioner ratified an otherwise invalid waiver by retaining consideration paid in exchange for the waiver and/or in failing to tender back said sums received pursuant to the terms of her separation of employment, thus making the waiver binding?

PARTIES TO THE PROCEEDINGS

Petitoner, Dolores M. Oubre, is a former employee of Entergy Operations, Inc., respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Cases Page

TABLE OF AUTHORITIES (continued)

Cases **Page**

TABLE OF AUTHORITIES (continued)

Cases **Page**

TABLE OF AUTHORITIES (continued)

Cases **Page**

TABLE OF AUTHORITIES (continued)

Cases **Page**

TABLE OF AUTHORITIES (continued)

Cases — Page

TABLE OF AUTHORITIES (continued)

Page

OTHER

(continued)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DOLORES M. OUBRE,
Petitioner

versus

ENTERGY OPERATIONS, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals rendered November 6, 1996 is reported at 112 F.3d 787. The opinion of the United States District Court for the Eastern District of Louisiana rendered May 20, 1996 is unreported.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was rendered November 6, 1996. The Petition for Writ of

Certiorari was filed on February 4, 1997 and granted April 21, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 and 2101 (c).

STATUTORY PROVISIONS

AGE DISCRIMINATION IN EMPLOYMENT ACT

SECTION 201. WAIVER OF RIGHTS OR CLAIMS

Section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end the following new subsection:

"(f)(1) An individual may not waive any right of claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

"(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual elegible to participate;

"(B) the waiver specifically refers to rights or claims arising under this Act;

"(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

"(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

"(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

"(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period had expired;

"(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class or employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

"(G) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum--

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G) or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may effect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."

STATEMENT OF THE CASE

(i) Course of the Proceedings

On September 26, 1995, petitioner, Dolores Oubre, a former employee of Entergy Operations, Inc. ("EOI") and an individual over the age of 40 at the time of her separation of employment, filed suit in United States District Court, Eastern District for the State of Louisiana. The Complaint was brought pursuant to Title 29 U.S.C. § 621, et seq, the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended in 1978, 1990, and 1991, and Louisiana Revised Statute Article 23:972 and 51:2231 et seq. Ms. Oubre has alleged that she was constructively discharged from her job because of her age.

Following limited discovery, Entergy Operations, Inc. filed a Motion for Summary Judgment on May 2, 1996. Respondent argued that the claimant waived her rights to bring a civil suit when she signed a waiver at the time of her separation of employment. Respondent further argued that Oubre ratified the waiver, which did not comply with the statutory requirements of the ADEA, by failing to return the benefits she received pursuant to the terms of her separation of employment.

The lower court entered Judgment in favor of the defendant's Motion for Summary Judgment on May 23, 1996.(Joint Appendix A-17) The Court ruled that it was not at liberty to disregard the jurisprudence of the Fifth Circuit Court of Appeals which portends that an invalid waiver under the ADEA is merely voidable and not void and that the claimant, who retains funds received upon separation of employment

and does not tender back said sums, acts to ratify the voidable waiver making it binding.

Notice of Appeal from final Judgment rendered on May 23, 1996 was timely filed by the claimant on June 19, 1996. Judgment was rendered by the Fifth Circuit of Appeals on November 6, 1996 affirming, without reason, the lower court ruling which granted respondent's Motion for Summary Judgment. (Joint Appendix A-22) Petitioner timely sought review of the lower court's decisions in this Court by Writ of Certiorari which was granted April 21, 1997.

ii. Material Facts

Dolores Oubre, a single female was employed as an Assistant Scheduler in the Planning and Scheduling Department at Waterford Steam Electric Generating Station ("Waterford III") in 1994. She had been employed at Waterford III as an EOI employee for approximately seven years. (Joint Appendix A-28,29)

In the fall of 1994, EOI implemented a new employee evaluation process called the Management Planning and Review Ranking Process (The "Ranking Process").(Joint Appendix A-37,38) The Ranking Process was allegedly developed to evaluate management and professional (salaried) employees at EOI by ranking them by two criteria, "performance" and "potential", as compared to their peers. Those rankings where then transfered to a matrix that placed employees in one of 9 groups.(Joint Appendix A-58,59)

It was mandated that 10% of the targeted population be ranked in category 9 or the lowest ranked group.(Joint Appendix A-37) People receiving two consecutive annual ratings in group 9 (fall 1994 and fall 1995) were to be ter-

minated from EOI. Termination, however, could occur anytime for any employee ranked 9 within the 12-month period proceeding the next annual evaluation. Severance was not to be paid to individuals *terminated* from group 9. Those ranked in group 9 were to be given individual action plans with the understanding that even if the individual met all goals, there was no guarantee that the individual would move out of group 9 and thus, would be subject to termination without benefits.(Joint Appendix A-49,50,51)

Pursuant to the ranking process, Oubre was ranked against all other salaried, non-managerial employees in the Planning and Scheduling Department. She ultimately fell into the group 9 category, although she had been awarded the highest evaluation level compared to her peers for the preceding two years. In 1992, Oubre received a promotion from Computer Operator I to Computer Operator II, an indication that she was promotable, which was a criteria for evaluation under the "potential" prong of the two pronged 1994 rating process.(Joint Appendix A-34) Further, the plaintiff had completed *all* of her goals established by her immediate Supervisor for 1994, a criteria to be used when evaluating an employee's annual performance, the second prong of the 1994 rating process. Thus, Oubre had no forewarning that she would fall within the 9 ranking and be faced with termination.

On January 17, 1995, Oubre was notified of her 9 ranking and the consequences thereof, i.e., that if she were ranked a 9 in next year's evaluation she would be terminated without the benefit of any severance pay, that an action plan would be developed for her (though one was not available

for her review) and if she did not continue to meet the goals and objectives of the action plan, she would be terminated at anytime.(Joint Appendix A-38,39,40) She was also told that even if she met all the goals, it would be very difficult to move out of the 9 ranking, thus resulting in termination. Once informed of the precarious and vulnerable status in which she found herself as an employee ranked 9, Oubre was then presented with a severance package that included a general waiver.(Joint Appendix A-41)

The petitioner was given only two weeks to contemplate and to comprehend the abrupt change in her employment status which was based upon an evaluation that was dramatically inconsistent with her previous performance.(Joint Appendix A-44) She also had to determine the availability of employment opportunities; determine if they would afford her enough income to meet her monthly financial obligations; assess her employability based upon having been labeled one of the lowest rated employees; and evaluate the risk in maintaining employment with EOI by selecting the action plan (which had not yet been drafted and which would subject her to potential termination within one to two months without any benefits) or accept the severance package. On January 31, 1995, after a second meeting with her immediate Supervisor, Jim Rooney, to clarify that it would be virtually impossible for her to move out of a 9 ranking, Oubre accepted the severance package, signed the waiver and was paid by EOI in accordance with the payment outlined in the severance package.(Joint Appendix A-49,50,51)

Given the circumstances surrounding the offer of the severance package, i.e., unexpected placement into the lowest ranked group of employees at Waterford III in contrast to her previous outstanding work performance and promotability potential, the insufficient time within which to review

the two options presented, the lack of information provided regarding other employees similarly situated, and the threat of termination if she opted to remain at EOI, the petitioner felt compelled to accept the severance and in return executed the waiver of rights.

SUMMARY OF THE ARGUMENT

The statutory language of the Older Workers Benefit Protection Act ("OWBPA") found at Secton 7 of the Age Discrimination in Employment Act ("ADEA") of 1967 (29 U.S.C. § 626, et seq) does not support the District Court's and Fifth Circuit Court of Appeals' application of the common law doctrine of ratification of an otherwise invalid waiver of rights by an employee who retains consideration paid pursuant to the terms of the waiver. The OWBPA states plainly that an older worker **may not** waive his rights under the ADEA unless the waiver is knowing and voluntary. To assure that a waiver is executed by an employee knowingly and voluntarily, Congress articulated numerous criteria which, at a minimum, must be contained in a waiver of rights. If the waiver is deficient in these requirements, then it is not enforceable by the employer against the employee who executed the waiver. Even if the waiver contains the specific provisions set forth in the OWBPA, an employee may still prove he did not knowingly and voluntarily executed the waiver in challenging its enforceability.

In enacting the OWBPA, Congress clearly abrogated the common law doctrine of ratification. The enforceability of a waiver is to be determined by the waiver's compliance with the requirements of the OWBPA and ultimately by the action of the employee in executing a waiver of rights as

knowing and voluntary at the time the waiver is executed. The actions of the parties following the execution of an invalid waiver is of no moment in light of the language of the OWBPA, the Congressional intent in enacting the OWBPA and in promoting the express purposes of the Act in protecting the rights of older workers. There is no support for the utilization of the common law doctrine of ratification in either the language of the statute or in the promulgation of the provisions of the act in promoting the protection of older workers. Quite to the contrary, application of the doctrine of ratification of an invalid waiver would nullify those protective measures specifically codified by Congress in the OWBPA.

While these same arguments also support rejection of the common law doctrine of tender-back as a condition precedent to suit, further countenance is found in the judicial precedence of this Court. This Court has previously rejected a tender-back requirement where such a requirement would override the protection provided by the Federal Employees Liability Act ("FELA"). 45 U.S.C. § 51, et seq.; *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968). There is no principle distinction between FELA and the OWBPA in that both statutes are intended to protect the rights of employees in relation to their employers who traditionally maintain a position of superiority. As a remedial statute, much like FELA, the OWBPA promotes the recovery for older workers injured by age discrimination and acts as a deterrent to employers from engaging in discriminatory behavior.

Enforcement of a tender-back requirement where a waiver is defective would eviscerate the act and neutralize any deterrent quality Congress intended the act to promote.

This outcome is clearly evident in the case at bar. The respondent has been afforded judicial validation of its unlawful acts in violating the OWBPA by the lower courts and escapes consequence of its unlawful acts because the petitioner can ill afford to tender-back the consideration at issue which was expended while seeking further employment.

Finally from a position of equity, the employee is placed at a severe disadvantage if forced to make choices regarding her future with little or no information from the employer and inadequate time to consider the options presented by the employer in contemplating termination of the employment relationship. Employers are clearly in a better position to protect their interests than is an older worker. The OWBPA equalizes this inherent disparity by requiring that the employee when faced with termination of the employment relationship make a knowing and voluntary choice to waive Federally protected rights of protection against age discrimination.

This court should reject both the theory of ratification and tender-back as espoused by the District Court and Fifth Circuit and rule that the invalid release presented by the respondent is unenforceable against Ms. Oubre, allowing her to proceed with her claim of age discrimination.

ARGUMENT

I. THE PLAIN READING OF THE OWBPA IS IN DIRECT CONFLICT WITH THE COMMON LAW CONTRACT DOCTRINE OF RATIFICATION

The initial question to be addressed by the Court is whether an employer's failure to conform to the waiver requirements enumerated in Section 7 of the Age Discrimination in Employment Act ("ADEA") of 1967 (29 U.S.C. § 626 et seq.), recognized in the legislative nomenclature as the Older Workers Benefit Protection Act ("OWBPA"), renders the waiver unenforceable. The statutory language of OWBPA makes it clear that an older worker may not waive the rights afforded him under the ADEA unless the worker knowingly and voluntarily waives these rights. In order for a waiver to be valid, Congress enumerated criteria which, at a minimum, must be satisfied to effect a knowing and voluntary waiver. If this criteria is not met, then this waiver is not made knowingly and voluntarily, and the rights afforded to the older worker under the ADEA remain enforceable. Based on the clear statutory language and the legislative purpose of the Act, the common law doctrine of ratification has no application to the enforceability of a waiver which violates the OWBPA.

A. *OWBPA and its Mandatory Provisions*

The Age Discrimination in Employment Act of 1967 prohibits discrimination in public and private employment against individuals who are at least forty years of age.

29 U.S.C. §§ 621-34. The ADEA is a hybrid of Title VII and the Fair Labor Standards Act ("FLSA"), 42 U.S.C. § 2000e and 29 U.S.C. §§ 201-19, in that the language enforcing nondiscrimination generally mirrors the language of Title VII, while the ADEA's remedies generally follow those of the FLSA.

Legislation introduced in the Senate as S. 1511, and later signed into law as OWBPA, [1] provided for the first time, by statute, that a waiver not supervised by the Equal Employment Opportunity Commission ("EEOC") may be valid and enforceable if it meets certain threshold requirements and is otherwise shown to be knowing and voluntary.[2] This was a distinct departure from prior practice and the prohibitive provisions of the FLSA and, as such, Congress intended that the "requirements of the Act be strictly interpreted to protect those individuals covered by the Act." Senate Committee Labor and Human Resource, The Older Workers Benefit Protection Act, S. Rep. No. 263 at 31, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.W. at 1509, 1537.

Congress, faced with the rising tide of reductions in force brought about by mergers, increased competition, and general corporate profitability concerns, ensured that older

---

[1] The waiver issue addressed in S. 1511 was a relatively diminutive portion of the overall Act, which was enacted primarily to overturn *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, (1989) (the Supreme Court ruled for the first time that the ADEA did not prohibit employers from discriminating in employee benefits).

[2] In 1978, Congress transferred authority for administering and enforcing ADEA from the Secretary of Labor to the EEOC. That transfer of authority did not alter the procedural provisions of the ADEA, but it did for the first time authorize the EEOC to promulgate rules interpreting the Act. The EEOC alleged that it lacked the resources to continue the practice of supervised waivers.

workers would not be coerced or manipulated into waiving their rights to seek legal relief under the ADEA. The House and Senate hearings on the OWBPA revealed a disturbing picture of waiver practices by employers coercing early retirees or employees into participating in exit incentive or other group termination programs and effectively forcing these older workers to waive their rights when the employer conditioned such participation on the signing of a waiver.

The facts surrounding Ms. Oubre's termination of her employment relationship with EOI is a typical example of abuse of waivers by employers which piqued Congress' concern in enacting the OWBPA. Ms. Oubre was included in a group termination program, 10% of salaried plant personnel ranked 9, who were confronted with the undesirable choice of staying with EOI and face eminent termination without benefits or accept a diminutive severance consideration in exchange for a waiver of rights. Faced with this option, Ms. Oubre, a single woman without benefit of supplemental financial support, felt she had no option but to accept the consideration and execute the waiver.(Joint Appendix A-57,58)

Congress' purpose in enacting OWBPA was two-fold: (1) to "make [ ] clear that discrimination on the basis of age in virtually all forms of employee benefits is unlawful," (referencing Congressional intent to override *Betts*) and (2) to "ensure [ ] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA" (referencing waiver requirements) while removing the EEOC's chief concern regarding the agency's capability to supervise. S. Rep. No. 263, 101st Cong., 2d Sess. 2 (1990).

The restrictive introductory language of the Act sets the tone for the very limited circumstances in which an employee may waive rights provided under the ADEA. The Act reads that "an individual ***may not*** waive any right or claims arising under the Act, unless the waiver is knowing and voluntary." 29 U.S.C.§ 626 (f) (1) (emphasis added) A waiver document *may not* be considered as being executed knowingly and voluntarily by the employee unless it meets, *at a minimum,* the following criteria:[3]

(A) the waiver must be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) it must specifically refer to rights or claims arising under the Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual does not waive rights or claims in exchange for consideration in addition to anything of value to which the individual is already entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

---

[3] When a settlement is reached pursuant to a charge filed with the EEOC, under that body's supervision, or pursuant to an action filed in court only criteria (A)-(E) need be met with the additional requirement that an individual be given a reasonable period of time to consider the settlement. 29 U.S.C. § 626 (f) (2).

(F) (i) the individual is given 21 days within which to consider the agreement; or

(ii) if the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given 45 days within which to consider the agreement;

(G) the agreement provides that for a period of seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the expiration of the revocation period; and

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. *Id.*

Congress, recognizing that some of the criteria specifically enumerated in the Act was already deemed indicative of

whether a waiver is knowing and voluntary to an individual, expressed its intent that *each* criteria must be met in order to have a valid waiver of rights. "[E]ach requirement set forth in the bill must be satisfied independent of the 'knowing and voluntary' factor for any waiver to be *lawful.*" H.R. Report 101-664 @ 51, 101st Cong. 2d Sess. (1990) (emphasis added)

The Act states that subpoints (a)-(h) are merely minimum requirements for a valid waiver, compliance with which is not a safe harbor for employers. The OWBPA was enacted to "establish a floor, not a ceiling." *Soliman v. Digital Equipment*, 869 F.Supp. 65, 68 n.12 (D.Mass. 1994) The language of the Act encompasses the possibility that all of the conditions could be met in a waiver and still, for other reasons not articulated in the Act, the waiver could be held not knowing and voluntary. One example of this situation would be if the employer lied to the employees or fraudulently concealed material facts. Thus, even if all provisions of OWBPA were complied with, the waiver could still be invalid if the employee can establish that the waiver was not knowing and voluntary.

The thrust of the Congressional intent of the OWBPA provisions, which set in place safeguards whenever waivers are utilized, rested upon the premise that employers should not pressure individuals into signing a waiver of legal rights, either by lack of time to adequately consider the terms and conditions of the offer, or through an insufficient explanation of the offer or the circumstances leading to the offer. Aging Comm. Pub. No. 722, Education and Labor Comm. Pub. No. 31, 101st Cong., 1st Sess. (1989); S. Rep. No. 263, 101st Cong., 2d Sess. (1990). The provisions enumerated in the Act, when enforced, provide the employee with the necessary time and information to make a knowledgeable decision regarding the offer extended by the employer. *Long v. Sears, Roebuck*

& *Co.*, 105 F. 3d 1529 (3rd Cir. 1997); *Raczak v. Ameritech*, 103 F.3d 1257 (6th Cir. 1996); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993). Through the provisions of the OWBPA, Congress limited and regulated the use of waivers in the context of an ADEA claim thus negating application of the common law doctrine of ratification.

As argued by the Court in *Long*, Congress explicitly intended to provide protective measures for employees beyond those found in common law. *Long*, 105 F.3d 1529 The court listed, among other examples, "[t]he right to seek counsel, the 45-day consideration period, the seven day right of revocation and the provision of detailed information about those affected by group terminations" as protections not afforded under the knowing and voluntary standard of common law. *Id.* at 1539. Each enumerated provision of the Act affords an older worker a safeguard which hinders or prevents an employer from intimidating employees into waiving their claims without sufficient time or information to consider the consequences of their actions. Only when all the requirements enumerated within the OWBPA are satisfied, is the rebuttable presumption of knowing and voluntary created.

This initial presumption is not met in the present case, as conceded by EOI, in part because Ms. Oubre was given woefully inadequate time to consider her options as presented by the employer and given no information regarding others affected by the forced ranking.(Joint Appendix A-61,62) Armed with time and knowledge, Ms. Oubre, or her representative, would have had the opportunity to detect an age bias in the ranking process and use the leverage of litigation to bargain for a more equitable exchange of consideration for her waiver of rights.The OWBPA, thus, creates a level playing field for the older worker with his employer when a valid waiver is utilized.

Congress was motivated to enact the OWBPA not only by the concern that older workers, solely because of their vulnerable status, were disadvantaged in negotiating with employers and thus, in need of protective guidelines pursuant to a waiver of rights, but also by the desire to alter the direction of newly authorized EEOC regulatory policy and subsequent jurisprudence.

In 1985 the EEOC issued a proposed rule permitting waivers under the ADEA without government supervision.[4] In light of the EEOC action, the Sixth Circuit, sitting *en banc*, reversed itself in *Runyan v. National Cash Register Corp.*, [5] ruling for the first time that a plaintiff could waive rights under the ADEA pursuant to a bona fide factual dispute-contrary to a legal dispute as address in *Lorillard* and in *Shulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925 (1964) (ruling that FSLA precludes bona fide settlement of dispute over coverage of overtime compensation and liquidated damages). 787 F.2d 1039 (6th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 850 (1986) While the court ruled that under particular circumstances employers and employees may negotiate a valid waiver of ADEA claims, it strongly cautioned courts not to allow employers to compromise the underlying policies of the ADEA by taking advantage of a superior bargaining position or by overreaching. *Id.* at 1044-45.

---

[4] In 1978, Congress transferred authority for administering and enforcing ADEA from the Secretary of Labor to the EEOC. That transfer of authority did not alter the substantive or procedural provisions of the ADEA, but it did for the first time authorize the EEOC to promulgate rules interpreting the Act. The EEOC alleged that it lacked the resources of capability to supervise waivers.

[5] 759 F. 2d 1253 (6th Cir. 1985) (ruling that an individual could not waive his rights under the ADEA pursuant to FLSA's ban on unsupervised releases.)

Immediately following the issuance of the EEOC final rule in August 1987, allowing private waivers under the ADEA, and in light of the growing body of jurisprudence regarding ADEA waivers, Congress, suspended the rule for one year to examine the legal foundation of the rule and public policy impact. 133 Cong. Rec. S 14383-84 (Oct. 15, 1987) The primary concerns raised by Congress focused on termination programs, the terms of which effectively forced an employee to waive his rights to file a claim when the employer conditioned participation in the program on the signing of such a waiver. The possibility existed, under such termination plans, for a preemptive waiver of rights to occur before a dispute had arisen and before an employee may even be aware of any potential or actual pattern of discrimination.[6] In support of suspending the EEOC's rule, Senator Melcher, Chairman of the Special Committee on Aging, expressed the policy concerns of Congress:

> "This is important because of the inherently different bargaining power of employers and employees. There will always be employees who feel that if they do not sign a waiver they will not only be out of a job, but will also forfeit any present or future benefits to which they may otherwise be entitled." 133 Cong. Rec. S14383 (October 15, 1987)

Following hearings in both the House and Senate the

---

[6] "In this non-dispute context, where employees have no reason to be on guard to protect their rights, it is simply bad public policy to allow waivers...[s]uch a result is wholly at odds with the purpose of ADEA." S. Hrg. No. 24, 101st Cong. (March 16, 1989) (Senator Metzenbaum, Chairman, Subcommittee on Labor, at 5)

suspension of the EEOC rule was extended an additional year.[7]

Although Congress acted decisively to prohibit the EEOC rule from taking effect, a number of lower federal courts issued decisions permitting unsupervised waivers under the ADEA in certain circumstances.[8] The rationale of these decisions was criticized as encompassing numerous factors or criteria sufficient to support an enforceable waiver on a case-by-case basis. Congress expressed concern that this approach would create far more litigation in the future. For this reason Congress intended Senate sponsored legislation, S. 1511 (OWBPA), and the House equivalent H.R. 3200, Title II (ADEA waivers) to limit waivers to certain situations and then spell out clear and ascertainable standards to govern

---

[7] Strong bipartisan support arose for the continued suspension with high criticism expressed for the EEOC's position. "These hearings have highlighted... the doubtful validity of the EEOC interpretation of Congress' intent when it incorporated the FLSA enforcement procedures of the ADEA." Letter from Senators Sasser, Leahy, Grassley, Mikulski, DeConcini, Weicker, Reid, Chiles and Lautenberg of June 7, 1988, reprinted at 134 Cong. Rec. S14511 (Oct. 4, 1988)

[8] Some courts relied on the EEOC rule making proceeding before the rule was suspended. *See, e.g. Runyan v. NCR Corp.*, 787 F.2d 1039, 1045 (6th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 850 (1986); *EEOC v. Cosmair, Inc.* 821 F.2d 1085, 1091 (5th Cir. 1987); *but see Conventry v. United States Steel Corp.*, 856 F.2d 514, 521-22n.8 (3rd Cir. 1988) (noted Congressional suspension of EEOC rule but declined to preclude unsupervised waivers). These lower court decisions, however, generally allowed unsupervised waivers only in settlement of a factual dispute between the parties or to compromise a claim that had already been brought. *See Runyan*, supra, 787 F.2d at 1044; *EEOC v. United States Steel Corp.*, 583 F. Supp. 1357, 1362 (W.D. Pa. 1984) Further, the lower courts continued to express a concern over potential abuse of the waiver process. *See, EEOC v. United States Steel Corp.*, supra; *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1991) (holding that termination agreement requiring employee waiver in return for severance pay was evidence that the employer willfully violated ADEA).

those situations.[9]

It was further noted that these lower court decisions were inconsistent with the Supreme Court's holding in *Lorillard* that the ADEA expressly borrowed its enforcement provisions (including supervision of waivers) from the FLSA. 434 U.S. 585 (1978). As clearly stated in House Committee report, to whom consideration of the bill was referred, "[t]his approach will clarify an unsettled area of the law and *reverse a disturbing trend of litigation concerning ADEA waivers.*" H.R. Rep. No. 664, 101st Cong., 2d Sess., (1990), at 27. (emphasis added)

Thus, Congress carefully contemplated the requirements to be included in the Act to arrest concerns that older workers, who are not equally positioned to be arms length negotiators with their employers, would execute a waiver of rights knowingly and voluntarily, in the absence of government supervision, and curtail a growing number of court decisions deemed detrimental to the rights of older workers. The ADEA was established in 1967 to protect employees of at least 40 years of age from discriminatory employment practices based on age. The mere fact that the ADEA was amended by the OWBPA in 1990, is evidence that Congress intended to afford older workers with additional protection than already existed under statute, caselaw or common law doctrine when waivers are utilized by employers. Congress clearly abrogated common law contract doctrine in enacting the OWBPA.

---

[9] Congress in contemplating legislation, rejected the applicability of common law contract principles and broadened the more stringent "totality of the circumstances" test by requiring certain protective factors that must be present for a waiver to be knowing and voluntary. S. Rep. No. 79 101st Cong., 1st Sess. 17 (1989).

B. *Invalid Waiver not Enforceable through Ratification*

It is clear that a plain reading of the statute prohibits a waiver of ADEA rights by an employee unless the requirements of the statute are met and the employee genuinely intends to release ADEA claims and understands that his actions will accomplish this goal. The waiver section of the OWBPA decrees unconditionally that "[a]n individual may not waive any right or claim" unless (at a minimum) the statutory conditions are met. 29 U.S.C. § 626 (f) (1). Congress has (for good public policy) deprived individual employees of the power to waive their claims unless the employer first follows the law.[10]

The "strong presumption" that the plain language of the statute expresses congressional intent is rebutted only in "rare and exceptional circumstances", *Rubin v. United States*, 449 U.S. 424, 430, (1981), when a contrary legislative intent is clearly expressed. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n. 12, (1987); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, (1980). "[S]tatutory construction 'must begin with the language of the statute itself,' and '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive'." *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580, (1982) (citations omitted). As stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984): "[F]irst, always, is the question whether

---

[10] A common theme is found in conventional labor law, which bars companies from entering into individual agreements with employees within a bargaining unit to prevent union busting. *See Alexander v. Gardner - Denver Co.*, 415 U.S. 36 (1974).

Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, [ ], must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842-843. A reading of a statute can not be plainly contrary to the intent of Congress. *Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, (1988).

The intent of Congress to prohibit a waiver of rights unless there is strict compliance with the terms of that statute is clearly articulated in the text of the statute and is further supported by the legislative history. The deliberate care with which OWBPA waiver requirements were drafted by Congress and the balancing of policies embodied in its choice of remedies argues strongly for the conclusion that the enumerated OWBPA requirements were meant to be mandatory to have any waiver of rights. This conclusion is fully confirmed by the legislative history of the waiver provisions.[11]

Thus, if a waiver does not contain the requirements enumerated under the Act, or an employee enters into an

[11] In addressing the standard of inquiry to be used in subsequently determining whether a waiver was made knowingly and voluntarily, the Senate managers of the bill left intact pre-OWBPA case law insofar as those decisions concerning the substantive determination of whether, in a given situation, a waiver has been executed knowingly and voluntarily. The Senate Committee specifically expressed support for the *totality of the circumstances* analysis utilized in *Civillo v. Arco Chemical Company*, 862 F.2d 448 (3rd Cir. 1988), and it disapproved, as did the House Committee, the approach used in *Lancaster v. Buerkle Buick Honda Company*, 808 F.2d 539 (8th Cir.), *cert. denied* 482 U.S. 928 (1987) which entailed the application of ordinary contract doctrine. *Senate Committee Labor & Human Resources*, the Older Workers Benefit Protection Act, S.Rep. No. 236, 101st. Cong., 2d Sess. 32 (1990)

agreement which alleviates the employer's obligations under ADEA without achieving the standard of knowing and voluntary, then the alleged waiver of rights is invalid and has no effect.[12] In *Oberg v. Allied Van Lines, Inc.*, the court concluded that "[N]o matter how many times parties may try to ratify [a waiver] contract, the language of the OWBPA, '[a]n individual may not waive' forbids any waiver". 11 F.3d at 682 (7th Cir. 1993). This rationale has been adopted by a majority of the courts outside the Fourth and Fifth Circuits.[13]

[12] As a general rule unlawful contracts are not enforceable. Reinstatement, Contracts §§ 598,607. "Without an antecedent contract to ratify, there can be no ratification." *Wamsley v. Champlin Refining Co.*, 11 F.3d 534, 539 (5th Cir. 1993)

[13] *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, n.12 (3rd Cir. 1997) citing, *EEOC v. Sara Lee Corp.*, 923 F.Supp. 994 (W.D.Mich. 1995) (no ratification where waiver is deficient under the OWBPA, employer and employee cannot contract to waive ADEA provisions); *Elliott v. United Technologies Corp.*, 94 CV 01577, slip op. (D.Conn. March 24, 1995) (ratification at odds with plain language of the OWBPA); *Soliman v. Digital Equipment Corp.*, 869 F.Supp. 65 (defective release cannot be ratified; tender back will chill bringing of meritorious claims) (D.Mass. 1994); *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1996) (Oberg approach better reasoned); *Carr v. Armstrong Air Conditioning*, 817 F. Supp. 54 (N.D.Ohio 1993) (plaintiff waived no rights since severance agreement violated the OWBPA; tender requirement not consistent with purposes of the ADEA); *Pierce v. Atchison, Topeka and Santa Fe Railway Co.*, 91 C. 3776, 1993 WL 18437 (N.D. Ill. Jan. 26, 1993), *aff'd in part, vacated and remanded in part*, 65 F.2d 562 (7th Cir. 1995) *appeal after remand*, 110 F.3d 431 (7th Cir. 1997) (OWBPA requirements preclude waiver by ratification); *Collins v. Outboard Marine Corp.*, 808 F.Supp. 590, 594 (N.D.Ill. 1992) (scope of defective release did not include claim under ADEA; consideration received need not be returned since it was not paid for relinquishment of ADEA claim); *Issacs v. Caterpillar, Inc.*, 765 F.Supp. 1359 (C.D. Ill. 1991) (ratification and tender-back not applicable to release deficient under the OWBPA).

To the contrary, the Fifth Circuit Court of Appeals has created a body of law that supports the premise that non-compliance with the requirements of OWBPA by the employer, as enumerated above, renders a waiver merely voidable and thus subject to further contract law doctrine of recision and ratification on the part of the parties. *Blakeney v. Lomas Information Systems, Inc.,* 65 F.3d 482 (5th Cir. 1995); *Wittorf v. Shell Oil Company,* 37 F.3d 1151 (5th Cir. 1994); and *Wamsley v. Champlin Refining and Chemicals, Inc.,* 11 F.3d 342 (5th Cir. 1994) (following *Grillet v. Sears, Roebuck & Co.,* 927 F.2d 217 (5th Cir. 1991) ratification of waiver under ADEA (pre-OWBPA) by retention of benefits) The Fourth Circuit Court of Appeals has also applied common law doctrine of ratification to OWBPA waivers. *Blistein v. St. John's College,* 74 F.3d 1459, 1465-66 (1966) (following *O'Shea v. Commercial Credit Corp.,* 930 F. 2d 358 (4th Cir.), *cert. denied,* 502 U.S. 859, 112 S.Ct. 177 (1991) applying ordinary contract principles to ADEA waiver, pre-OWBPA).

In *Wamsley,* the Fifth Circuit reasoned that neither the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA. 11 F.3d at 539[14] "[S]ignificant is the absence of any language in the statute and any statement in the legislative history indicating that a waiver executed in contravention of

---

[14] This interpretation is directly contrary to the language and purpose of the statute. "The Committee wishes to emphasize that waivers are initiated by the employer, not the employee. By implying that older workers have an inherent "right" to a waiver of fundamental civil rights confuses the issue and misinterprets the legislation. The legislation is designed to protect the older workers' rights and not take them away." H.R. Rep. No. 664, 101st Cong. 2d Sess. (1990)

OWBPA requirements is void...and cannot be ratified..." *Wamsley,* 11 F.3d at 539-40. The Fourth Circuit Court, relying on the same premise, held in *Blistein,* that, "[n]othing in OWBPA...abrogates the common law principle that an invalid agreement can be ratified by subsequent conduct." *Blistein,* 74 F.3d at 1465-66.[15]

These courts misunderstand the basic premise of the statute, which was to displace common law doctrine provisions with respect to waivers for age discrimination claims. In rejecting these common law arguments the Third Circuit Court of Appeal, noted that Congress abandoned common law principles by mandating requirements for establishment of "knowing and voluntary" waivers under OWBPA which far exceed grounds for contractual obligation avoidance. *Long v. Sears, Roebuck & Co.,* 105 F.3d at 1539.

The OWBPA carefully defines what constitutes a knowing and voluntary waiver, thus displacing the common law definition of knowing and voluntary. *See, Fleming v. United States Postal Service AMF,* 27 F.3d 259, 262 (7th Cir. 1994) Indeed, further evidence of Congress' intent to override pre-OWBPA jurisprudence guided by common law principles is the shift in initial burden of proof from the employee to the employer to show that a waiver was "knowing and voluntary". In *Wamsley,* the Fifth Circuit failed to take into account the fact that both the provisions of the statute and the legislative history evidences that Congress rejected and

---

[15] In fact it is significant to note that in the body of legislative history accumulated in the two years in which Congress contemplated the Act no reference or commentary is made championing ratification of a waiver as a bar to suit; nor does the Act itself or its numerous preceding incarnations contain a ratification clause.

usurped application of common law principles in enacting OWBPA.[16]

More importantly applying the common law principle of ratification to a defective waiver would eviscerate the force of the statute. Under the respondent's theory, and that adopted by the Court of Appeals, a waiver must comply with the terms of the statute unless and until an individual accepts the consideration offered by the employer, in other words, until the individual cashes the check. Presumably, this would apply in all circumstances for the individual will almost, or almost always, cash the check. Applying this theory would mean that the statute reads, in part, that an individual must be informed of the right to seek counsel, unless the individual accepts the consideration offered by the employer. If this theory is accepted, the statutory protection afforded by the OWBPA will be nullified.

Pursuant to the Act, enforceability of a waiver is made contingent upon the presence of the enumerated requirements contained therein. Given the specific goals of the OWBPA it is clear that Congress did not intend that the common law doctrine of ratification be applied to waivers invalid under the OWBPA. As noted by the Third Circuit, at the time the OWBPA was enacted, not a single court of appeals had held that a waiver which was not knowing and voluntary could, nonetheless, be enforced pursuant to ratification. *Long* 105 F.3d at 1540 n. 17.

---

[16] The Fifth Circuit's own dicta argues that grounds to contest contractual performance, such as fraud, mistake and duress, were already available to employees faced with an ADEA waiver prior to the enactment of the OWBPA, thus, ignoring Congresses action in adding criteria for a knowing and voluntary waiver. *Wamsley*, 11 F.3d at 537 n. 8.

Further, an essential basis to understanding the purpose to the statute is the fact that Employers are, by far, in a better position to protect their own interests than are older employees. Employers do not need the ratification doctrine to assure protection under their waivers; they need only comply with the OWBPA. If an employer, who has the resources to become aware of what the Act requires, complies with the Act, the employee is hindered from pursuing litigation. If an employer fails to comply with the Act, it may find itself in the undersirable position of a defendant in litigation, but only as a result of its own actions and thus, no judicial solicitude or sympathy is warranted.

Federal common law, such as the ratification doctrine argued by the Respondent, should be resorted to only in the absence of action by Congress and when the Court is compelled to consider federal questions which cannot be answered from federal statutes alone. *United States v. Texas*, 451 U.S. 304, 305 (1993) As stated by this Court:

> "[W]hen Congress addresses a question previously governed by a decision [which] rested on federal common law the need for exercise of lawmaking by federal courts disappears. Unlike the determination of whether federal law pre-empts state law, which requires evidence of a clear and manifest congressional purpose, the determination of whether federal statutory of federal common law governs starts with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law. The question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress address the problem formerly governed by federal common law." *Id.*

Thus, in this context, the question is not whether application of the common law doctrine of contract ratification is equitable as argued by the lower courts, but whether it is intended by Congress. The presumption holds that Congress is understood to legislate against a background of common-law adjudicatory principles. *See, Briscoe v. Lahue,* 460 U.S. 325, (1983); *United States v. Turley,* 352 U.S. 407, 411, (1957). Thus, where a common-law principle is well established, as are the rules of ratification, *see, Commonwealth Mortgage Corp. v. First Nationwide Bank,* 873 F.2d 859, 865-66 (5th Cir. 1989); *Morta v. Korea Ins. Corp.,* 840 F.2d 1452 (9th Cir. 1988); *Anselmo v. Manufacturers Life Ins. Co.,* 771 F.2d 417 (8th Cir. 1985),the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident". *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, (1952).[17]

The fictional presumption created by the lower court, that Congress intended that an invalid waiver be given life by ratification, should be given consideration only upon legislative default and applying only where Congress has failed expressly or impliedly to evince any intention on the issue. This is simply not the case with OWBPA. The language and the inherent purpose of the OWBPA dictates that a valid waiver under the Act and the enforceability of the waiver are inextricably linked; adherence to the terms of the Act is fundamental to enforcement. "The critical point is not

[17] This interpretative presumption is not, however, one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumptions's application to a given statutory scheme. "The purpose of Congress is the ultimate touchstone." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208, (1985), (citations omitted).

that the Act fails specifically to do away with ratification. It is instead that the ratification doctrine is logically inconsistent with the specific terms of the OWBPA." *Long v. Sears, Roebuck & Co.,* 105 F. 3d at 1540 n. 17 (3rd Cir. 1997) The common law fiction of a "new promise" forged from retention of benefits has no place in the statutory scheme of the OWBPA. *Id.* at 1539.

The common law doctrine of ratification is not supported by the text of the OWBPA. Congress clearly mandated that an individual "may not" waive his rights; Further, the legislative history, is replete with reference to legislative purpose in resolving an unsettled area of law and void of proviso prohibiting retention[18]. Finally, when the OWBPA is enforced as interpreted by the Fifth Circuit[19], the effect would be contrary to the purpose of the statute in providing extraordinary protective measures for older workers who are asked to execute waivers and relinquish Federal rights.

[18] A substitute bill was proposed which included an offset for damages received if a waiver was set aside for any reason. There was no mention of ratification or tender back. This provision was rejected and not included in the final version of the bill. H.R. Rep. No. 664, 101st Cong., 2d Sess. (1990)

[19] "The Court is now concerned with the enforcement of a new promise which gives rise to a new legal obligation. As a new promise that creates a new obligation, it is not subject to the Waiver requirements of § 626, and thus, such requirements pose no bar to its enforcement." *Wamsley,* 11 F.3d at 540, n. 11

II. REQUIREMENT OF TENDER-BACK UPON FINDING OF INVALID WAIVER IS INCONSONANT WITH THE PURPOSE OF THE OWBPA

Once an employee's waiver of ADEA rights has been deemed invalid because the employer has failed to comply with the requirements of the OWBPA or is otherwise found not to be "knowing and voluntary" then this Court must determine whether the retention of or failure to tender-back benefits obtained pursuant to execution of the invalid waiver operates to prevent an employee from pursuing a claim under the ADEA. Congress assiduously defined what must be included in a knowing and voluntary waiver under the ADEA, and characterized the legal effect of a waiver which fails to satisfy the statutory requirements as being unenforceable. The common law concept of tender-back, as a pre-requisite to suit, is so closely aligned with that of ratification[20] that it should be rejected for the same reasons discussed above. In addition, the judicial precedence of this Court does not provide support for the argument that a tender-back of benefits received, pursuant to a waiver which violates the OWBPA, should be a condition precedent to suit. Likewise, the purposes of the Act and the equitable considerations underlying it dictate that a tender-back argument should be rejected.

A. *The Hogue Analysis of Rejection of Tender Back*

This Court has previously rejected a tender back requirement in the context of a suit arising under the Federal Employees Liability Act (FELA). 45 U.S.C. § 51 et seq.;

---

20 "States that require a tender to challenge a release sometimes use the language 'condition precedent to suit' and sometimes use the language of 'ratification'. But there is no meaningful difference between the two." *Issacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1372 (C.D.Ill. 1991)

Hogue v. Southern Ry. Co., 390 U.S. 516, (1968) This Court ruled that a requirement to refund consideration obtained under an invalid waiver, "as a prerequisite to institution of suit would be 'wholly incongruous with the general policy of the Act...' " *Hogue* 390 U.S. at 518 (citation omitted) Such a requirement would override the protection provided by the Act. The Court's interpretation of the fundamental objective of the Act-to protect employees' due process rights to recover under the Act-served as the foundation for the ruling. *Id.*

This rationale was applied to a waiver under the ADEA, pre-OWBPA, by the Eleventh Circuit Court of Appeals in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), in which the Fifth Circuit's ruling in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) regarding tender back was rejected. 927 F.2d at 221. (*Grillet* is a pre-OWBPA decision in which the Fifth Circuit first abandoned the totality of the circumstances approach with regard to determining "knowing and voluntary" and resorted to strict contract law doctrine.) The Eleventh Circuit ruled that the deterrence factor cited in *Hogue*, "that a tender requirement would deter meritorious challenges to releases in FELA lawsuits" applied to ADEA claims. *Forbus*, 958 F.2d at 1040. As explained by the Court:

> "Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would in our opinion, encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such

> conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case." *Id.* at 1041 (11th Cir. 1992)

Numerous Courts have applied the *Hogue* analysis in rejection of a tender back requirement in lawsuits brought pursuant to other federal statutes wherein Congress preempted common law standards. For example, the Ninth Circuit in *Botefur v. City of Eagle Point, Oregon,* ruled that a civil rights plaintiff was not required to return or offer to return consideration received pursuant to a valid waiver agreement as a prerequisite to initiating a § 1983 action premised on the violations purportedly released by the agreement. *Botefur,* 7 F.3d 152 (9th Cir. 1993). The Court held that the rule announced in *Hogue,* that tender back is not required for suit under the FELA, is generalized to suits under other federal *compensatory* statutes where no justification exists for qualifying a plaintiff's rights. *Id.* at 156.[21]

In *Oberg v. Allied Van Lines,* 11 F.3d 679, 683 (7th Cir 1993), the Seventh Circuit, rejected the tender back requirement under the newly enacted provision of the OWBPA

[21] *See also, Home Box Office, Inc. v. Spectrum Electronics, Inc.,* 100 F.R.D. 379, 382 n. 1 (E.D.Pa. 1991) (not citing *Hogue* but holding that under antitrust law, benefits available under federal law cannot be defeated by state common law rules; no ratification where plaintiffs failed to tender back); *Washner v. American Motors Sales Corp.,* 597 F.Supp. 991 (E.D.Pa. 1984) (not citing *Hogue* but finding Pennsylvania law with respect to ratification of releases incongruous with Automobile Dealer's Day in Court Act where Act was intended to provide redress for the very activity alleged; amount retained was to be set off against any damages); *Smith v. Pinell,* 597 F.2d 994, 996 (5th Cir. 1979) (plaintiff allowed to proceed under Jones Act despite having signed release and received settlement; Jones Act analogize to FELA).

based upon the *Hogue* rationale in *Forbus.* The Court in *Oberg,* followed by the Sixth Circuit in *Raczak,* 103 F.3d 1257, 1269 (6th Cir.1996) and the Third Circuit in *Long,* 105 F.3d at 1540 (citing *Oberg*), was convinced that analogizing the policy of the ADEA to that of the FELA, and thus applying *Hogue,* was correct. *Oberg,* 11 F.3d at 684; *see also, Constant v. Continental Telegraph Company,* 745 F. Supp. 1374 (Co.Ill. 1990); *Isaacs v. Caterpillar, Inc.,* 765 F. Supp. 1359 (R.D. Ill. 1991) (relying on *Hogue* to reject tender requirements in an ADEA case).

There is no principle distinction between FELA and the OWBPA, and thus, this Court's precedent should govern here.[22] Indeed, both FELA and OWBPA are statutes intended to protect the rights of employees against the superior power of the employer and in both instances, requiring the individual to return the money in order to proceed with a suit would effectively nullify the protection afforded specifically by Congress.

As a remedial statute, ADEA promotes recovery for injured older workers subjected to age discrimination and acts as a deterrent to employers from engaging in discriminatory behavior. As stated by the Court in *Long:*

> '[I]t is impossible to view the ADEA as anything other than a federal remedial statute. The ADEA was enacted in order to further the dual goals of compensating discrimination victims and

[22] The Court in *Wamsley* argued that the facts of *Hogue* are clearly distinguishable from the facts relied upon under the ADEA statutory scheme primarily because Hogue's physical injury was not in dispute. *Wamsley,* 11 F.3d at 540-52. The Fifth Circuit fails to consider that the FELA is not a worker's compensation statute, thus liability of the employer is an element of proof (stipulated to by the parties in *Hogue*) equally burdened upon the FELA claimant as it is upon the ADEA claimant.

> deterring employers from practicing discrimination. As the Supreme Court wrote in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 884 (1995); "[t]he private litigant who seeks redress from his or her injuries vindicates both the deterrence and compensation objectives of the ADEA.' " 105 F.3d 1529, 1541 (3rd Cir. 1997).

No justification exists, in common law or otherwise, to qualify an older worker's right to these statutory benefits by imposing a tender back requirement.

B. *Tender Back Not Supported By Legislative History or Intent*

The OWBPA, in providing statutory guidelines in favor of employees, clearly stands for the edict that employers should not be permitted to exploit their superior bargaining positions and the vulnerable conditions of their older workers by forcing them to sign away their rights. *See, Coventry v. United States Steel Corp.*, 856 F.2d 514 (3rd Cir. 1988). In *Coventry*, the Court ruled that the employer placed unfair economic pressure on the claimant to sign a waiver when faced with the option of having all of his income and benefits ceased immediately. *Id.* at 524. As stated by Chairman Edward R. Roybal in addressing the necessity of the OWBPA:

> "... An older worker, faced with the likely prospect of termination and knowing the difficulties of finding another job at an older age, is in a desperate situation. He often has no alterntive but to take whatever benefits the employer is willing to offer him, even if it means giving up fundamental employment rights. Furthermore, it is highly unlikely that, at this point, the older worker even knows what fundamental rights he is entitled.
>
> I believe that this is totally unacceptable. Employers should not be permitted to exploit their superior bargaining position, and the vulnerable condition of older employees by forcing them to sign away their rights. By allowing this to continue, we are simply encouraging employers to engage in discriminatory employment practices." *Joint Hearing before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor*, 101st Cong., April 18, 1989.

The facts of this case are a clear example of the "egregious behavior" cautioned by the *Forbus* Court if employers are allowed to so easily circumvent the law. Imposing a tender back as a precedent condition to filing suit would allow employers to violate the OWBPA requirements at will with little threat that an employee would be in a position to relinquish needed funds or rejuvenate spent funds once the employee realizes that he has been subjected to discrimination.

"[A] tender requirement where a waiver is defective under the OWBPA would effectively eviscerate the act." *Long*, 105 F.3d at 1542. "No matter how egregiously releases might violate the requirements of the [OWBPA], employees would be precluded from challenging them unless they somehow...come up with the money they were given when allegedly forced into retirement." *Issacs v. Caterpillar, Inc.*, 765 F.Supp. 1359, 1367 (C.D. Ill.1991) Further, to bar a worker who has executed a void waiver from challenging

it by his inability to tender back the consideration received, would in effect "make the release enforceable as a practical matter." *Fleming v. United States Postal Service AMF O'Hara, et al*, 27 F. 3d 259, 261 (7th Cir. 1994). The Respondent, in effect, seeks judicial validation of and avoidance of ramifications for its unlawful acts in violating the OWBPA.

Public policy considerations support the determination that retirees or older workers should not be required to tender back their benefits, retirement or otherwise, obtained pursuant to a waiver agreement, as a prerequisite to the maintenance of a lawsuit. *Long*, 105 F.3d at 1541; *Issacs*, 765 F.Supp. at 1366-68. The OWBPA was specifically designed to prevent egregious behavior on the part of employers in forcing older workers into early retirement or out of the workforce for the economic benefit of the company, and this Court should reject a tender requirement as a prerequisite to instituting a challenge to a waiver in an ADEA case.

The Fifth Circuit has rejected the application of *Hogue* in ADEA cases suggesting that the statutes serve different purposes. *Wamsley*, 11 F.3d 534, 540. "Congress advanced FELA's purpose of providing liberal recovery of injured rail workers... No such purposes underlie the ADEA." *Id.* at 542; see also, *Rivers v. Northwest Airlines, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 1217 (E.D.Mo. 1995) (failure to tender back benefits precluded ADEA claim even where waiver was deficient under OWBPA).[23] This distinction misses the point-indeed the remedies available under the ADEA exceed those available under FELA. The important similarity, however, between the statutes is that they afford broad and specific

[23] The Fourth Circuit in *Blistein v. St John's College* does not discuss the issue of tender back. *Blistein*, 74 3d. 1459

protection to workers, protection that would be lost if a tender back requirement was superimposed on the statute-or if a tender back requirement were written into the waiver agreement itself.

The enforcement of the common law doctrine of tender back places an employee in a severely disadvantaged bargaining position in contrast to the employer - a specific concern raised time and again in the legislative history of the Act.[24] Senator Melcher, Chairman of the Special Committee on Aging, explained the underlying policy concern:

> This is important because of the inherently different bargaining power of employers and employees. There will always be employees who feel that if they do not sign a waiver they will not only be out of a job, but also will forfeit any present or future benefits to which they may otherwise be entitled." 133 Cong. Rec. §14383 (Oct 15, 1987)

It is just as obvious that an employee, who feels coerced into waiving his rights due to financial exigency or because of an inability to recognize the potential of a claim since no actual dispute exists with the employer, will not be in a better financial position at a later point in time, when newly acquired information reveals potential discrimination on the part of the employer. If he later learns that he was replaced by a younger worker, he still does not have the financial

[24] "[A]s long as there is a financial incentive involved and as long as the worker cannot know how the overall offer is structured or what the overall patterns of the company are, the signing of a waiver becomes in effect coercive." S. Hrg. No. 24, 101st Cong., 1st Sess. (1989) at 7.

wherewithal to tender back.[25] Most workers will consume the consideration received pursuant to executing the waiver on living expenses while seeking alternative employment. Also, as an older worker, there is a real possibility of not being able to obtain employment at an equivalent salary.[26] This was exactly the case with Ms. Oubre who testified that the only job she was able to obtain post EOI was not enough to pay her bills. Each month she has to dip into savings in order to make ends meet. She cannot afford to tender the money back and was placed in this predicament by EOI - the violators of OWBPA.(Joint Appendix A-60)

C. *Tender Back Requirement Is Not Grounded in Equity*

Applying a ratification-tender back rule where the employer has drafted an invalid waiver could require employees who did not receive the information required under the OWBPA, to make uniformed choices. These employees would be forced by the ratification and tender back doctrines to decide, in the continued absence of information, whether to surrender severance pay or waive all clalims under the OWBPA. Employees whose waivers are defective under the OWBPA would be no better off than before the OWBPA was enacted; they could be forced to make critical decisions without information deemed essential by Congress for those decisions to be knowing and voluntary. "Courts which have applied the tender... principles to ADEA releases

---

[25] One Court would alleviate this potential "hardship" on the employee by disallowing an option to tender back altogether, *Hodge v. New York College of Podiatric Medicine*, F. Supp. 579, 584 (S.D.N.Y. 1996) (tender back an impossibility following ratification)

[26] Once out of work, older workers have less than a 50/50 chance of ever finding new employment. See Age Discrimination in Employment Act-Waiver of Rights, S. Hrg. No. 717, 100th Cong., 2d Sess. (1988) at p. 149 (testimony of Carin Ann Clauss).

which fail to conform to the OWBPA have rendered the [Act] meaningless." *Long*, 105 F.3d at 1542.

In espousing the rule that a tender back is required, the Fifth Circuit Court simply fails to take into consideration public policy or reality issues. Take for example the plight of Ms. Oubre, a single woman relying solely upon her own income, who received severance funds of a little more that $6,000.00 (on a monthly basis, as opposed to a lump sum), which sums she used to pay living expenses while she sought other employment. Oubre is currently making one-half the salary she earned at EOI and would suffer a hardship if required to tender back the funds received from her employer to proceed with her suit.[27] (Joint Appendix A-60)

Rather than focusing on either the purpose of the Act or the plight of the worker, the Fifth Circuit raises the spectre that employers will face protracted litigation with employees who will use the compensation (paid by the employer to avoid litigation) to finance their lawsuits. *Wamsley*, 11 F.2d at 539. This argument not only ignores the economic reality of the comparative disparate financial position of the employee juxtapose to the employer,[28], but also ignores the clear intent of the Act to place the burden on the employer with regard to defending a waiver utilized in the termination of an older worker. "Any benefit that flows from

---

[27] "The Congressional assumptions underlying the OWBPA posit that most covered employees need severance benefits to fund living rather than legal expenses." *Long*, 105 F.3d at 1543 (3rd Cir. 1997)

[28] "[E]mployees with baseless claims have strong incentives to keep severance payments rather than risk them in prolonged litigation" *Long*, 105 F. 3d at 1543.

the use of the waiver flows entirely and directly to the employer who would be entitled to raise the existence of a waiver in any subsequent claim or charge by the individual of age discrimination." H.R. Rep. No. 664, 101st Cong., 2d Sess., (1990) "The OWBPA was designed to protect employees negotiating with employers, not protect employers from overreaching plaintiffs." *Long*, 105 F.3d at 1543. Thus, compliance with the statute and non-participation in discriminatory practices, coupled with utilization of Rule 12 and Rule 56 of the Federal Rules of Civil Procedure, will alleviate the employer's concerns of "protracted" litigation with nefarious claimants.[29]

The choice the District Court would place before older employees, as adopted from *Wamsley*, amounts to no choice at all: pursue your claim at the risk of your livelihood. Testimony before Congress established that older workers facing termination "could not afford" to do so without separation benefits. *Age Discrimination in Employment Waiver Protection Act of 1989; Hearing on 5.54 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 61 (1989) (Testimony of Robert Patterson).

An older worker, such as the petitioner, faced with the likely prospect of termination and knowing the difficulties of finding another job at an older age, is in a desperate situation. She had no alternative but to take whatever benefits the employer was willing to offer her, even if it meant giving up fundamental employment rights. The provisions of the OWBPA was enacted to avoid precisely this situation and

---

[29] "[T]he managers do not intend to disturb the law as it existed prior to passage of this bill including the law under Rule 12 and Rule 56 of the Federal Rules of Civil Procedure." Rep. Clay, Floor Manager, S. 1511 Final Substitute: Statement of Managers, 101st Cong., 2d Sess.

thereby to create a "level playing field" between employer and employee. When allowed to ignore these requirements, the employer is placed in a favored position to exercise its superior bargaining power to the disadvantage of the employee. The argument urged by the courts of the Fourth and Fifth Circuits, that it is inequitable for the employee to "have it both ways" by retaining funds and pursuing suit against the employer, neglects the fact that the employer then receives a windfall.

> "When an employee must tender severance benefits prior to suit, it is very difficult to return that employee to his pre-release position. He is not restored to employment, the employer may still assert the release as an affirmative defense, and there is no guarantee that the employee will ever obtain the information to which he is entitled under OWBPA. 'Such an exchange would arguably unjustly enrich the employer.' " *Long*, 105 F.3d at 1544, citing *Issacs*, 765 F. Supp. 1367.

Employers are clearly in a better position to protect their own interests than is an older worker. One of the simplest protections for the employer is to comply with the Act.

Ratification or an impractical tender-back requirement, as argued by the respondent, would nullify the protective measures of the Act and allow an employer to bait an older worker to waive his rights. For example, it would be clearly impermissible for an employer to offer $5,000 00 to an individual who wants to seek advise of counsel, but offer $10,000.00 if the individual waives this right. Yet, what the respondent is seeking in this case is no different-it seeks to obtain the option of buying an invalid waiver by playing on the vulnerabilities of older workers such as the claimant.

The respondent would place older workers in a financial position where they must use their "severance" pay to survive financially and then require them to pay it back (tender) if they choose to go forward with a claim, thus making enforceability of the Act an impossibility.

An additional equitable argument to be proffered in applying the *Hogue* non-tender back holding is that under the tender back doctrine the claimant would be required to relinquish all waiver consideration-even that obtained for waiver of other violations of law or contract. *Long*, 105 F.3d at 1544. While it can be argued that the consideration offered by the employer was to "buy its peace" in general, it appears that a full tender would unduly benefit the employer and penalize the employee, *See Isaacs*, 765 F.Supp. at 1370.

The waiver at issue is a general waiver, one that waives the employer from numerous types of claims, all of which other than the ADEA claim, are arguably barred. To require tender of the full amount of consideration would force an employee to return a sum that typically incorporates consideration for multiple factors not challenged in an age case including a public relations benefit to the employer that itself may deter other litigation.

III. CONCLUSION

The holdings of the Courts of the Fourth and Fifth Circuits in applying the common law fiction of ratification from a retention of benefits, or a condition precedent of tender back, is inconsistent with the language and the spirit of the OWBPA. Such an application works a hardship on employees who could not have known that by accepting and retaining consideration in exchange for a waiver of rights, they were in effect, declining the protection of the OWBPA. Given the clear and specific goals of OWBPA, the common law

doctrine of ratification and tender-back can not and should not apply when courts are confronted with determining the results of an invalid OWBPA waiver.

The facts of the case presented are typical. An employer will use its superior bargaining position to place unfair economic presure on a claimant to sign a waiver. Congress was cognizant of this fact when it drafted the OWBPA and incorporated numerous requirements that afforded an older worker with meaningful protection against employer abuse.

Pursuant to the Congressional history previously presented, it is clear that the legislative intent regarding interpretation of the OWBPA and the implementation of the Act was to be strictly construed with regard to compliance with the requirements of the statute. The Act plainly states that an individual "may not" waive any right or claim under the ADEA unless the waiver is "knowing and voluntary". It thereafter clearly sets forth the minimum requirements for a knowing and voluntary waiver. If these requirements are not met the waiver is invalid.

The legislative history of the Act indicates that the fundamental purpose of the OWBPA waiver provisions is to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion or mistake of material fact. By allowing the enforcement of a waiver that fails to comply with the OWBPA, the Courts of the Fourth and Fifth Circuits ignore this Congressional mandate. When Congress enacted the ADEA, it had in mind not only to provide benefits to victims of discrimination, but also

to create incentives to companies to obey the law. The provisions of the OWBPA reinforced these dual purposes.

To allow unrestricted and unlimited use of invalid waivers and to apply existing contract law to determine their enforceability will circumvent the intent of the law. The facts as presented in this case clearly show how an employer can circumvent the spirit of the law and be rewarded for it.

Thus, for the reasons argued above, this Court should hold that a waiver which does not comply with the OWBPA and is otherwise not knowing and voluntary is invalid and not enforceable reversing the decision of the lower court and remand this matter to the District Court for trial on the merits.

Respectfully Submitted,

Barbara S. Haynie
DONELON, HAYNIE & DONELON
Suite 1010
3445 N. Causeway Blvd.
Metairie, Louisiana 70002

W. Richard House, Jr.
John S. Lawrence, Jr.
HOUSE, KINGSMILL, REISS & SEABOLT, L.L.C.
Suite 3300
201 St. Charles Avenue
New Orleans, LA 70170